Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
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Petition of BellSouth Telecommunications, Inc.	)	
For Forbearance Under 47 U.S.C Sec. 160(c)	)	WC Docket No. 04-405
from Application of Computer Inquiry and	)	
Title II Common-Carriage Requirements	)	

REPLY COMMENTS OF FDN COMMUNICATIONS, INC.,
PAC-WEST TELECOMM, INC AND TDS METROCOM, LLC

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January 28, 2005

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For the reasons stated below, FDN Communications, Inc., Pac-West Telecomm, Inc., and TDS Metrocom, LLC ("Joint CLECs") request that the Commission deny the above-captioned petition filed by BellSouth Telecommunications, Inc. ("BellSouth").

I. INTRODUCTION AND SUMMARY

Commenters filing in support of the BellSouth petition have not acknowledged, much less addressed, that there is no intermodal competition in the wholesale market for broadband access to customers' premises. This is particularly important because the Commission designed the *Computer II/III* safeguards to assure a viable wholesale market for last mile access to customers. In the retail residential market, there is at most a duopoly for the provision of high-speed Internet access service, and the Commission has recognized that duopoly competition is insufficient to replace regulation to assure that rates for service are reasonable and nondiscriminatory. Finally, there is limited or no intermodal competition in the retail business broadband market.

Even overlooking its failure adequately to address the wholesale market, BellSouth and supporting commenters fail to justify forbearance under the standards of Section 10 of the Act. In particular, they fail to provide the rigorous identification and analysis of markets that the courts have required in order for the Commission to forbear from important statutory and regulatory requirements. Thus, the forbearance request would apparently also apply to special access services which the Commission has previously explicitly excluded from consideration as within the scope of previously contemplated broadband relief. The petition should be denied for these reasons alone.

Therefore, the Commission may not conclude, on the present record, that intermodal competition is sufficient to assure reasonable and nondiscriminatory terms and conditions of service for any broadband service. Even if there were sufficient competition to support a finding that ILECs are non-dominant in some broadband markets, such competition would not warrant the sweeping forbearance sought by BellSouth because the Commission has continued to apply the core requirements of Title II even to non-dominant carriers. Accordingly, the Commission should promptly deny the BellSouth petition.

II. TITLE II AND *COMPUTER INQUIRY* SAFEGUARDS REMAIN NECESSARY

The standard for review of BellSouth's Section 10 forbearance petition requires the Commission to evaluate each prong of the statutory forbearance, standard. If the Commission finds the petition lacking on any one of the three requirements, the Commission must dismiss the petition.[1] Comments filed in response to BellSouth's petition demonstrate that BellSouth has

[1] *CTIA v. FCC*, 330 F.3d, 502, 509 (D.C. Cir. 2003).

failed to satisfy the rigorous standard for each requirement of the forbearance provision under Section 10 of the Act.

Comments in this proceeding, including those from rural ILECs, confirm that despite the role of cable companies in providing residential broadband, ILECs retain market power in the provision of broadband service in both the residential market and the business market. In the residential markets where cable companies also provide broadband service, the ILECs share their market power. There are also residential markets where the ILECs do not face competition from cable, and business markets where cable modem service does not meet the needs of business customers, allowing the ILECs to retain sole possession their market power.

In their comments, the ILECs are unable to present viable evidence demonstrating that other forms of regulation such as price cap regulation, or rate of return regulation, provide an effective check on ILEC abuse of its market power to restrain broadband competition. Instead, the ILECs claim that neither Title II nor the *Computer Inquiry* rules remain necessary because of the presence of cable and other firms that provide marginal broadband competition such as Wi-Fi, satellite, broadband over powerline ("BPL") or wireless.[2] In contrast, other comments show that given the substantial market power the ILECs retain, and the inability of other regulatory tools to discipline possible abuse, the effective repeal of Title II of the Act requested by BellSouth is wholly unwarranted.

A. Comments Confirm that The ILECs Retain Market Power

While the ILECs claim they lack market power because the presence and success of the cable companies, nothing in their filed comments presents any new evidence contradicting the decades of precedent providing that the presence of two viable competitors in a market means

[2] SBC Comments at 4; Qwest Comments at 7.

the firms *share market* power so that both firms retain an incentive to exclude competitors and raise rates.[3] Moreover, cable provides such nominal competition in the business market that the ILECs retain their exclusive power in that market. Thus, in both the residential and business markets, the protections of Title II and the Commission's *Computer Inquiry* rules remain necessary to prevent unjust and unreasonable practices and rates, to protect consumers, and are in the public interest.

1. At a Minimum, ILECs Share Market Power in the Residential Market

The Commission has previously found that competition sufficient to diminish the need for regulation will not exist where the market is primarily allocated between two dominant firms.[4] Courts have recognized that a duopoly in the market is the equivalent of a monopoly because, "firms in a concentrated market … in effect share monopoly power by recognizing their shared economic interests and their interdependence with respect to price and output decisions."[5] A "durable duopoly affords both the opportunity and incentive for both firms to coordinate to increase prices."[6] Thus, at a minimum, even where the ILECs share their broadband monopoly with cable, they have market power and the incentive to abuse that power.

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[3] *See* Joint CLEC Comments at 27.

[4] *See Application of EchoStar Communications Corporation, General Motors Corporation, and Hughes Electronics Corporation, Transferors, and EchoStar Communications Corporation, Transferee,* CS Docket No. 01-348, Hearing Designation and Order, FCC 02-284, 17 FCC Rcd 20559, 20684 ¶¶ 103-105 (2002) ("*EchoStar Merger Order*").

[5] *Brooke Group v. Brown & Williamson*, 509 US 209, 227 (1993).

[6] *FTC v. Heinz,* 246 F.3d 708, 725 (D.C. Cir. 2001).

There are, of course, areas throughout the country where cable does not compete with DSL. As AT&T observes, many mass-market consumers lack access to cable modem service.[7] In rural areas, ILECs have used regulatory tools available to them as regulated common carriers under Title II to deploy broadband where cable facilities do not exist. NECA, for example, recognizes that the "current level of broadband deployment in small rural markets" would not be possible without the current Title II regulatory structure.[8]

Further, there is no reliable evidence to suggest that new intermodal alternatives will change the broadband mass market from a duopoly to a fully competitive market. Nor is there evidence that any "of these technologies and service categories has yet posed anything like a significant antidote to the incumbents market power."[9] Verizon for example does not even dispute that competition today from satellite, BPL, and other technologies is minimal to the point of being irrelevant.[10] Instead, Verizon claims the Commission must predict "future market conditions" rather than simply assess the market conditions today, citing to snippets of the Commission's decision in the *Bell Atlantic-NYNEX Merger Order*. However, the Commission should not afford significant weight to predictions of future intermodal competition.

First, Verizon's reliance on the *Bell Atlantic-NYNEX Merger Order* is misplaced. In that order, the Commission stated that it had the ability to use predictive judgments to assess how the

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[7] *See* AT&T Comments at 41.

[8] NECA Comments at 4.

[9] *See Rulemaking To Amend Parts 1, 2, 21, and 25 of the Commission's Rules to Redesignate the 27.5-29.5 GHz Frequency Band, to Reallocate the 29.5-30.0 GHz Frequency Band, to Establish Rules and Policies for Local Multipoint Distribution Service and for Fixed Satellite Services)* Second Report and Order, Order on Reconsideration, and Fifth Notice of Proposed Rulemaking, 12 FCC Rcd 12545, 12618 ¶ 164 (1997) ("*LMDS Order*")

[10] Verizon Petition at 6-7.

merger might effect competition in the future.[11] However, nowhere did the Commission state it must do so. The Commission can, and should, decide this petition based on the conditions of the market today, rather than making predictive judgments that are bound to be inaccurate.[12]

Second, Verizon misconstrues the scope of the Commission's authority to make predictive judgments cited in the *Bell Atlantic-NYNEX Merger Order*.[13] In Paragraph 7 of the order, the Commission simply observed that its merger order would examine markets as it expects they will exist after a Bell Company receives 271 authorization, and "the most critical provisions of Sections 251 and 252" have been implemented.[14] Thus, the Commission did not step out on a limb to predict the commercial and technological viability of technologies that have yet to be deployed to consumers on any wide scale, but rather assumed the completion of several regulatory proceedings that were under way. As the Commission observed in the *LMDS Order*, when "none of these technologies and service categories has yet posed anything like a significant antidote to the incumbents market power" the Commission's analysis should emphasize current market conditions and the incumbents' current market power.[15]

Regardless of the Commission's authority to make predictive judgments concerning the evolution of communications markets, Commission decisions must offer a "sufficient relationship between the Commission's conclusion and the factual bases in the record upon

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[11] *Applications of NYNEX Corp, Transferor, and Bell Atlantic Corp., Transferee, for Consent to Transfer Control of NYNEX Corp. and its Subsidiaries*, Memorandum Opinion and Order, 12 FCC Rcd 19985, 19989-90 ¶ 7 (1997) ("*Bell Atlantic-NYNEX Merger Order*").

[12] *See id.* ¶ 164.

[13] *See* Verizon Petition at 7.

[14] *See Bell Atlantic-NYNEX Merger Order* at 20011-12 ¶ 41.

[15] *LMDS Order* at 12618 ¶ 165.

which it relied."[16] Even when making predictive judgments, the Commission remains bound to explain:

> the reasons why (it) chooses to follow one course rather than another. Where that choice purports to be based on the experience of certain determinable facts, the (agency) must, in form as well as substance, find those facts from evidence in the record. By the same token, when the (agency) is obliged to make policy judgments where no factual certainties exist or where facts alone do not provide the answer, (it) should so state and go on to identify the considerations (it) found persuasive."[17]

Thus, the ability to render predictive judgments using the "public interest" standard does not confer unfettered discretion on the agency administering it.[18]

In other words, while the Commission is not bound by the standard of proof required in the courts, the Commission remains bound to rest its predictions on fact rather than fantasy. As the Commission is painfully aware, predictions of future broadband competition from the electric power industry and wireless broadband technology have been plentiful over the last decade and beyond. However, these predictions have yet to come true. Given the history of empty promises and inaccurate predictions, the Commission cannot easily justify BellSouth's ambitious forbearance proposal.

In particular, the Commission has a policy of refraining from wild speculation regarding the development of alternative last mile technologies, to which it should adhere in this instance. For example, in the 1997 *LMDS Order*, the Commission restricted the ability of incumbent cable

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[16] *United States v. Allegheny-Ludlum Steel Co.*, 406 U.S. 742, 755-56 (1972).

[17] *Air Products & Chemicals, Inc. v. Federal Energy Regulatory Commission*, 650 F.2d 687, 699 (5th Cir. 1981).

[18] *See American Postal Workers Union, AFL-CIO v. U.S. Postal Service*, 891 F.2d 304, 308 (D.C. Cir. 1989)

companies and ILECs to obtain LMDS licenses in their own incumbent territories.[19] The Commission observed that despite belief that there were sources of likely or potential competition in video and local telephony, the current incumbents had market power.[20] Thus, "however optimistic those beliefs may be, they do not change the fact that, at this time, LECs and cable firms hold market power."[21] The Commission thus determined, "to assert that competition from these various sources is likely to arise requires a great deal of speculation."[22] Because "none of these technologies and service categories has yet posed anything like a significant antidote to the incumbents market power," the Commission declined to predict their impact on the market in the future and declined to base regulatory policy on such predictions.[23]

The Commission's hesitation in the *LMDS Order* was justifiable. The failure of previous efforts to provide commercially viable wireless broadband access are well documented, and the current efforts at delivering wireless broadband remain in the developmental stages. As the WSJ recently observed:

> "Wireless-broadband services have a rocky history. Companies such as Winstar and Teligent tried to offer similar services during the telecom boom of the late 1990s, with limited success. Sprint's efforts with so-called fixed-wireless technology led to a $1.2 billion write-down.
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> For the technology to get even more affordable, experts say the much-hyped WiMAX technology needs to be certified and standardized, which could still be a year away, and another year

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[19] *See LMDS Order*, at 12556 ¶ 13.

[20] *See id.* ¶ 164

[21] *Id*.

[22] *Id*.

[23] *See id*.

after that before it is widely available in laptops and other devices."[24]

Similarly, the Commission has predicted competition from electric utility communications services for years while no viable competition has taken root.[25] The Commission has also explored the promises of advanced fiber deployments for decades, and despite these promises, they have yet to bring any broad benefit to consumers.[26]

In contrast, market conditions today unequivocally show that there is currently no viable large-scale competitor to DSL or cable modem broadband services.[27] Simply because a market is evolving rapidly does not mean that new entrants are successfully entering the market and providing competitive services. In the face of facts that current entrants have not been able to establish a foothold in the market, the Commission should decline the RBOC invitation to predict that the future of BPL, WiMax and other nascent technologies will succeed where others have failed. Commenters in this proceeding typically agree that elimination of *Computer Inquiry* and Title II safeguards based on the hype surrounding 3G, WiMax or BPL without any demonstrated commercial success would be arbitrary and capricious.[28]

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[24] Jesse Drucker and Almar Latour, Internet and Phone Companies Plot Wireless-Broadband Push, THE WALL STREET JOURNAL, January 20, 2005, p. A10, viewed January 24, 2005 at http://online.wsj.com/article_print/0,,SB110617646006230682,00.html.

[25] *1995 Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 11 FCC Rcd 2060, ¶ 120 (1995) (Commission observed that electric utilities that have incurred substantial costs to deploy networks that reach nearly every household in the country could compete with cable companies).

[26] *See e.g.* Robert Pepper, *Through The Looking Glass: Integrated Broadband Networks, Regulatory Policies, And Institutional Change*, Office of Policy and Plans Working Paper No. 24, ¶¶ 21, 24 (1988).

[27] Joint CLEC Comments at 18.

[28] *See* ITAA Comments at 6-7.

2. **ILECs Maintain Market Power in the Enterprise Market**

While the ILECs may share market power with cable providers in some markets, in the business market the ILECs retain sole possession of their market power. The ILEC claim that the business market is fully competitive falls short for several reasons. While Verizon claims that the business market is intensely competitive, it fails to acknowledge that the carriers to whom Verizon attributes the competition, rely on the ILEC for provision of the last mile facilities necessary to provide broadband service.[29] The ILECs also mistakenly claim that cable provides significant competition in the broadband market.

Verizon, for example argues that the *TRO* supports the ILEC position that cable broadband competition obviates the need for continued *Computer Inquiry* safeguards and Title II regulation.[30] However, Verizon's citation to *TRO* ¶ 292 is misplaced, because that discussion concerns the residential market, not the business market.[31] To the contrary, the *TRO*'s findings on competitive impairment in the business market remain persuasive.[32] Competitors face "steep economic barriers" to the deployment of last mile broadband facilities,[33] and these barriers "typically make duplication of such facilities uneconomic."[34] It is natural then that competitors have only built their own last mile broadband facilities to a small percentage of business

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[29] AT&T Comments at 36-37.

[30] Verizon Petition at 8.

[31] *See TRO* ¶ 292.

[32] *See* Time Warner Telecom *et al*. Comments at 9.

[33] *See TRO* ¶ 199.

[34] Separate Statement of Commissioner Kathleen Abernathy, Triennial review remand Order Press Release, *Unbundled Access to Network elements*, WC Docket 04-313, *Review of Section 251 Unbundling Obligations of Incumbent Local exchange Carriers,* CC Docket 01-338, (rel Dec. 15, 2004).

customers.[35] Facilities based CLECs, such as Time Warner Telecom, still rely on ILEC provided loop facilities at 75% of its customer locations.[36]

ILEC commenters also contend cable has emerged as a viable competitor in the business market, eliminating the ILECs' market power.[37] These claims lack evidentiary support. In fact, the Commission has recently observed "Cable modem service is primarily residential service."[38] Even BellSouth admits that in many markets cable networks pass, let alone serve, only a quarter of small and medium sized business customers, not including large business customers.[39] Less than 1% of cable modem subscribers are medium or large businesses or government entities.[40]

Comments filed in this proceeding demonstrate that currently, cable modem service is not a substitute for broadband services that Joint CLECs and other competitors provide using ILEC supplied wholesale loop facilities.[41] Cable modem service is not an adequate alternative to ILEC services because it is unsuited for most business customers' needs for a number of reasons, including that it is asymmetrical, relatively low bandwidth, and lacks sufficient reliability and

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[35] *See* Time Warner Telecom *et al* Comments at 9 *citing* RBOC 2004 UNE Report, WC Docket 04-313, filed Oct. 4, 2004 at p. I-2.

[36] *See* Time Warner Telecom *et al* Comments at 10.

[37] Verizon Petition at 5-6.

[38] *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, GN Docket No. 04-54, Fourth Report to Congress, GN Docket No. 04-54, Fourth Report to Congress, FCC 04-208, at p. 14 (rel. Sep. 9, 2004) ("*Fourth Advanced Services Report*").,

[39] Ex parte letter of Jonathan Banks, BellSouth, to Marlene H. Dortch, FCC, *Unbundled Access to Network Elements*, WC Docket 04-313, *Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket 01-338 at p. 5 (filed Nov. 8, 2004).

[40] *High-Speed Services for Internet Access: Status as of June 30, 2003*, Industry Analysis and Technology Division, Wireline Competition Bureau (December 2003), Table 1 and Table 3.

[41] *See* Time Warner Telecom *et al* Comments at 11-13.

security.[42] Therefore, cable operators are unable to provide a serious alternative to serve business customers.

In light of this evidence, it is no surprise that the Commission, in the *TRO Remand Order*, rejected ILEC requests to eliminate their obligation to provide unbundled access to high capacity loop and transport facilities. In rejecting the RBOC claims that competitors did not need access to unbundled last mile broadband facilities, Chairman Powell explained, "the record and our analysis demonstrated that competitors still depended significantly on them in the overwhelming majority of markets and, thus, we have required unbundling in those circumstances."[43]

Consistent with the its decision in the *TRO Remand Order*, the Commission should retain the safeguards of the *Computer Inquiry* rules and Title II because broadband competitors in the enterprise market rely extensively on ILEC last mile facilities.

B. Initial Comments Provide No Assurance That the ILECs Will Refrain From Exercising Market Power To Exclude Competitors in the IP-Enabled Marketplace

Essential to a forbearance analysis under Section 10 is the principle that sufficient competition among entrants may supplant the need for the regulation. Where such competition has yet to take root, commitments from the market participants that they will refrain from acting on their incentive to abuse extensive market power should be expected. However, no such commitments can be found in the comments of the RBOCs. Far from providing assurance of nondiscrimination, RBOCs contend that there broadband offerings should at most be considered

[42] Ex Parte Letter from Thomas Jones, Counsel for Cbeyond Communications LLC, to Marlene H. Dortch, WC Docket No. 04-313, CC Docket 01-338, November 19, 2004 at p. 3-4.

[43] Separate Statement of Chairman Powell, *Triennial Review Remand Order Press Release.*

"private carriage."[44] The cornerstone of private carriage, however, is that the carrier may choose with whom to deal and on what terms and conditions to provide service on an individual basis. Thus, in effect, BellSouth and other RBOCs candidly ask for the ability to discriminate against competitors and even deny access entirely to them. As already explained in Joint CLECs' initial comments, the RBOCs will have substantial incentives to discriminate against competitors in the IP enabled marketplace.[45] On the present record, an RBOC effort to obtain the legal permission to discriminate against competitors requires denial of the BellSouth petition.

C. ILECs Fail to Justify the Unprecedented Step of Forbearance from Application of Title II and *Computer Inquiry* Safeguards

It is well documented that when the Commission determines that a market is sufficiently competitive so that regulation becomes unnecessary, the Commission, without exception, retains the core protections of Title II. These protections remain as vital backstops against abuse of any deregulation and provide consumers and competitors a forum to air grievances to the extent they arise.[46] Thus, in relieving interexchange carriers of many of the requirements of Title II regulation, the Commission retained core components of Title II such as the prohibitions against unjust and unreasonable practices and discriminatory pricing, as well as the right of consumers to file complaints at the Commission under sections 201-202. Likewise, interexchange carriers remain obligated to resell their services under Commission regulations.

Even if forbearance were otherwise justified, which it is not, the ILECs provide no justification that warrants affording them greater relief from regulatory requirements than those

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44 *See e.g.* Qwest Comments at 7-8; SBC Comments at 10-11; Verizon Petition at 10-11.

45 Joint CLEC Comments at 23-26.

46 *See* AT&T Comments at 17-18.

the Commission has provided when other markets become competitive, such as CMRS or long distance.

III. THE REQUESTED RELIEF WOULD IMPEDE THE DEPLOYMENT OF BROADBAND

The Commission has made the deployment of broadband "the central communications policy objective of the day."[47] To remain consistent with that declared policy objective, the Commission should not entertain policy proposals that would retard the widespread deployment of broadband. Yet the proposals set forth in BellSouth's petition do just that. First, the development of VoIP alone, without eliminating regulations that led to the development of a robust Internet and information services market, will drive broadband investment. Second, rural carriers have provided compelling arguments that elimination of Title II regulation will impede the deployment of broadband in rural areas where geographical, economic and technological factors make broadband costly to deploy.

A. VoIP, Without Any Forbearance Will Drive Broadband Investment and Deployment

The RBOCs contend that the Commission's statutory goal of promoting broadband investment embodied in Section 706 of the Act compels forbearance.[48] But the opposite is true. IP-enabled services are dependent on the presence of broadband transmission facilities. The availability of broadband transmission facilities on a nondiscriminatory basis and a wholesale

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[47] *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities; Universal Service Obligations of Broadband Providers*, CC Docket No. 02-33, *Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services*, CC Docket Nos. 95-20, *1998 Biennial Regulatory Review—Review of Computer III and ONA Safeguards and Requirements*, Notice of Proposed Rulemaking, 17 FCC Rcd 3019, 3021 ¶ 1 (2002) ("*Wireline Broadband NPRM*"), ¶ 1.

[48] Verizon Petition at 12-14.

market for such facilities will allow the creation of innovative new IP-enabled applications and their introduction into the market.

The goal of broadband deployment thus works hand in hand with the Commission's objective of facilitating the transition to an IP-enabled communications marketplace.[49] In the *IP-Enabled NPRM*, the Commission predicted that the emergence of IP-enabled communications would revolutionize the market, by reducing prices, increasing innovation and promoting individualization of services. Joint CLECs agree with the Commission's prediction. IP-based services are rapidly redefining communications by offering consumers and small businesses a feature-rich, affordable alternative to traditional telephone and data services.

It is essential to the continued development of independent IP-enabled services, including VoIP, that third parties retain access to consumers over the facilities owned by telecommunications companies. Demand for these services in the IP-enabled market will drive demand for the necessary broadband facilities. If however, the owners of transmission facilities can deny their customers access to feature-rich services provided by unaffiliated companies, the demand for those network assets will diminish.

Historically demand for, and innovation in, information services such as VoIP has been generated by the ability of third party providers to access customers using the facilities of telecommunications common carriers. The open nature of the Internet has fostered the commercial development of the Internet and enabled the emergence of IP-enabled services. It would be illogical now to promote policies that stifle the development of such innovation, rather than foster it. If the Commission continues to pursue the goal of facilitating and encouraging IP-enabled and other information services, it should act to ensure that innovative companies and

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[49] *IP-Enabled Services,* WC Docket 04-36, *Notice of Proposed Rulemaking,* ¶ 5 (rel. Mar. 10, 2004).

innovative services continue to have access to the customers who demand such services. In order to remain consistent with the policy that it espoused in the *IP-Enabled NPRM*, the Commission should deny BellSouth's blunt request that it be permitted to discriminate in favor of its own VoIP and information services, and against independent providers.

Therefore, the Commission should consider carefully whether its decision in this, and other proceedings, would adequately protect consumers from attempts by the communications infrastructure companies to block third-party services in favor of their own service offerings.

B. Rural LECs Rely on Universal Service Funding to Build Out Broadband Networks

Rural telephone companies oppose the BellSouth petition.[50] These companies recognize that the current regulatory structure benefits the deployment of broadband, particularly to rural markets where there are no suitable alternatives, including cable available to consumers and the telephone network remains the sole source of delivering broadband capability.

The rural carriers that filed comments in opposition to BellSouth's petition argue forcefully that elimination of Title II regulation for broadband would make it "difficult, if not impossible for rural, high-cost companies to recover their network costs," which in turn would lead to "an increase in the rate" for broadband services.[51] As NTCA explains, "the high cost of providing service in thinly populated rural regions of the country would prevent some smaller telephone companies from offering such services on a deregulated basis."[52]

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[50] *See* Nebraska Rural Independent Comments at 2; National Telecommunications Cooperative Association Comments at 2 ("NTCA Comments").

[51] Nebraska Rural Independent Comments at 8-9.

[52] NTCA Comments at 2.

Similarly, the relief requested would jeopardize the ability of carriers to offer broadband service through tariffs and take advantage of pooling. As NTCA explains "today's levels of broadband deployment in small rural markets simply would not exists without the benefits of NECA's tariffs and pools."[53] NECA explains the benefits of its tariff and revenue pool in terms of support for rural broadband, stability and security for the carriers that deploy service.[54]

As with so many other important issues, BellSouth in its petition, and supporting RBOC comments ignore the impact of forbearance on rural ILECs. The potential impact on rural ILECs precludes the Commission from finding that forbearance would serve the public interest as required under Section 10(a)(3).

IV. THE RBOCS PROPOSE UNLAWFUL FORBEARANCE STANDARDS

A. The Commission Must Consider Wholesale Intermodal Competition

Like BellSouth, RBOCs and others supporting BellSouth's petition fail to address or acknowledge the absence of wholesale intermodal broadband competition. The courts have found that forbearance from dominant carrier regulation requires "a painstaking analysis of market conditions" supported by evidence.[55] An adequate analysis of intermodal broadband competition would identify the product and geographic markets, the firms that participate in those markets, calculate market shares, analyze supply and demand elasticities and address possible barriers to entry.[56] However, like BellSouth, other RBOCs fail even to attempt to

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[53] *Id*. at 3.

[54] NECA Comments at 4.

[55] *WorldCom, Inc. v. FCC*, 238 F.3d 449, 459 (D.C. Cir 2001) *AT&T Corp. v. FCC*, 236 F.3d 729, 735-737 (D.C. Cir. 2001).

[56] *See, e.g. EchoStar Merger Order*, 17 FCC Rcd 20559 at ¶¶ 105-150; Horizontal Merger Guidelines, U.S. Department of Justice and Federal Trade Commission, April 2, 1992, revised April 8, 1997.

identify the particular markets in which they seek regulatory relief in terms of either services or geographic markets even though the Commission has recognized that the retail services product market is distinct from the wholesale product market.[57]

Instead, the RBOCs merely request forbearance from application of any regulation to "broadband." Broadband, in turn, is not defined as a service but as a technology, *i.e*. "technologies that are capable of providing 200 kbps in both directions."[58] Even here they disagree, however, with SBC urging forbearance for a different technology definition.[59] Although the RBOCs have submitted reams of information purporting to show the existence of intermodal competition, their comments lack any analysis of markets, let alone the "painstaking" and rigorous analysis required by the courts. Absent information concerning the wholesale market, BellSouth and its supporters fail to make a threshold showing sufficient for the Commission to consider forbearance. For this reason alone, the BellSouth petition must be denied. It is also worth pointing out that requesting forbearance for a technology is absurd; since the Commission does not apply Title II regulation to technologies but to telecommunications services.

In any event, even if the RBOCs identified the particular markets for which they seek forbearance, they have submitted no information at all showing intermodal competition in the wholesale market for broadband. Although the RBOCs have made some factual showing regarding intermodal competition, it is limited to showings concerning retail competition at the national level for a particular service — cable modem Internet access service — limited to the

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[57] *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, Second Report and Order, 14 FCC Rcd 19237, 19241 ¶ 8 (1999).

[58] BellSouth Petition at 1 n. 1.

[59] SBC urges forbearance for services that offer service of 200 kbps in one direction. SBC Comments at 2, n. 4.

residential market. Thus, the RBOCs call to the Commission's attention the fact that ILEC DSL-based Internet access service and cable modem service have roughly split shares for the retail residential market. Absent a showing that there is significant wholesale intermodal broadband competition, in both the residential market and the business market, there is no basis for the Commission to find under Section 10(a)(1) that application of *Computer II/III* and Title II regulation is unnecessary to assure that rates for BellSouth's broadband access services will be just, reasonable, and nondiscriminatory.

The RBOCs failure to address the wholesale market is a crucial omission because in *Computer II/III* the Commission expressly sought to preserve wholesale offerings. The Commission deemed necessary the *Computer II/III* safeguards that the RBOCs now want eliminated precisely because there were no wholesale alternatives available to independent providers that did not possess last mile connections to customer premises. Thus, RBOC showings of intermodal retail competition are irrelevant to the forbearance relief requested because the *Computer II/III* safeguards are focused on wholesale services provided to ISPs, not the retail services the RBOCs discuss. In this connection, independent broadband service providers do not have any serious last mile alternatives to the current ILEC wholesale common carrier offerings for reaching customers premises. Although independent providers compete against each other, they are all dependent on the ILEC's last mile connections. Thus, *Computer II/III* safeguards remain as valid and necessary today as when they were adopted.

To emphasize further that independent providers lack wholesale alternatives, cable operators' cable modem offerings are not sufficient to constrain incumbent telcos' market power in the wholesale market for a number of reasons. First, cable operators are under no obligation to make any such offering to competing providers and they do not do so. Cable operators are under no obligation to make such offerings because the Commission in the *Cable Modem Declaratory Ruling* erroneously determined that the transmission component of cable modem service is "telecommunications" but not a telecommunications service. The 9th Circuit reversed that decision, but instead of choosing to follow through on the obvious consequence that cable operators must offer the underlying transmission component to other providers on a common carrier basis, the Commission has chosen to appeal that decision to the Supreme Court. At this point, cable operators' broadband transmission services are considered "private carriage" which means essentially that they may choose to whom they will provide service and on what terms and conditions.

Earthlink, which as an ISP is well positioned to know if cable operators make wholesale offerings to ISPs on a private carriage basis, notes that with limited exceptions cable operators refuse to sell transmission service to unaffiliated ISPs.[60] Earthlink states that there is not a competitive wholesale market for the last mile and other services they need to provide their broadband retail services. Other ILEC commenters, similar to BellSouth, provide no evidence that ISPs have wholesale alternatives to ILECs' service. Of course, even if there were such cable alternatives, this would show only the existence of a duopoly that, as explained elsewhere in these reply comments, is insufficient to assure that prices are reasonable and nondiscriminatory.

Moreover, apart from the absence of any wholesale offering, cable operators do not for the most part serve business customers. Broadband service providers that that want to serve business customers do not have access to a cable alternative to ILEC broadband wholesale services.[61] As discussed above, cable modem service is not an adequate alternative to ILEC

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[60] Earthlink Comments at 19. See also Opposition of the Federation of Internet Solution Providers of America at 28 – 33.

[61] *Id*.

services because it is unsuited for most business customers' needs for a number of reasons, including that it is asymmetrical, relatively low bandwidth, and without sufficient reliability and security.[62] Therefore, cable operators are unable to provide a serious wholesale alternative to serve business customers even if they were otherwise willing to do so.

Finally, even if there were some wholesale intermodal competition for last mile connections, it does not follow that all Title II regulation may be eliminated. In particular, the Commission has always applied the fundamental obligations of Title II – nondiscrimination, reasonable rates, and the possibility of complaints - to all telecommunications carriers even to those found non-dominant. The mere existence of some competition is therefore not a sufficient basis for eliminating these Title II obligations. The Commission has never granted forbearance from the fundamental common carriage obligations of Sections 201 and 202. Therefore, the requested forbearance must be denied, even if there were sufficient wholesale intermodal competition to make BellSouth non-dominant in that market.

V. THE PETITION SEEKS DEREGULATION OF SPECIAL ACCESS SERVICES

As noted above, BellSouth and supporting commenters have failed to provide any analysis of the services or product markets for which they seek forbearance. Instead, they seek forbearance for any technology that permits two-way communications greater than 200 kbps. The overly broad petition should be denied, if for no other reason, because the petition would effectively deregulate special access services, which frequently provides a capability far in excess of 200 kbps. Characteristically, BellSouth and other ILECs fail to acknowledge that special access is apparently within the scope of the requested relief. Nor do other RBOCs address, much less demonstrate, that there is any basis for dispensing with the Commission's

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[62] Cbeyond Ex Parte Letter, WC Docket No. 04-313, November 19, 2004.

regulatory program governing special access, although that program is in serious need of reform.[63]

Regulatory oversight of special access service is necessary because BellSouth has shown that it has the incentive, ability and propensity to discriminate in that market. In December 2004, the Commission found that BellSouth had engaged in unlawful discrimination in the provision of special access service by offering greater discounts to BellSouth's long distance affiliate than to non-affiliated competitors.[64]

In the *Dom/Non-Dom Proceeding*, in which the Commission is considering some of the relief encompassed by the BellSouth petition, the Commission specifically excluded special access from consideration.[65] That same consideration should apply here. Although the petition should be denied in its entirety, at a minimum, the Commission should categorically exclude special access from consideration in this proceeding.

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63 *Wireline Competition Bureau Seeks Comment on AT&T's Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access,* Public Notice, RM No. 10593, DA 02-2913, released October 29, 2002.

64 *AT&T Corp. v. BellSouth Telecommunications, Inc.*, Memorandum Opinion and Order, FCC 04-278, EB-04-MD-010 (Dec. 9, 2004).

65 *Review of Regulatory Requirements for Incumbent LEC Transmission of Broadband Services*, Notice of Proposed Rulemaking, 16 FCC Rcd 22745, 22758 ¶ 22 (2001).

VI. CONCLUSION

For these reasons, the Commission should dismiss or deny the above-captioned petition.

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January 28, 2005